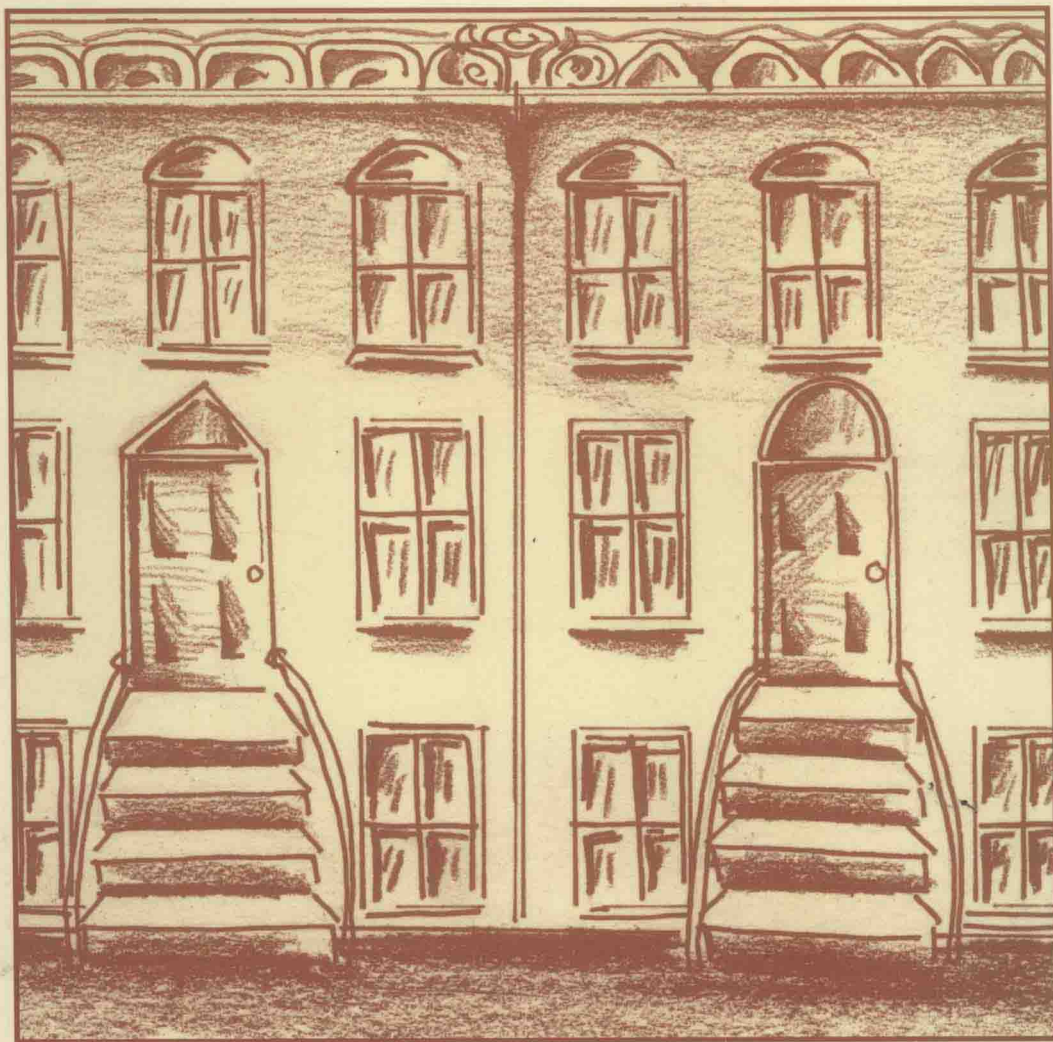


EXAMPLES & EXPLANATIONS

# Property

Second Edition

**Barlow Burke and Joseph Snoe**



**ASPEN**  
PUBLISHERS

# PROPERTY

---

## Examples and Explanations Second Edition

Barlow Burke

*John S. Myers & Alvina Reckman Myers Scholar  
and Professor of Law  
American University  
Washington College of Law*

Joseph Snoe

*Professor of Law  
Samford University  
Cumberland School of Law*

**ASPEN**  
PUBLISHERS

111 Eighth Avenue, New York, NY 10011  
[www.aspenpublishers.com](http://www.aspenpublishers.com)

© 2004 Barlow Burke and Joseph Snoe

All rights reserved. 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:

Permissions  
Aspen Publishers  
111 Eighth Avenue  
New York, NY 10011

Printed in the United States of America

2 3 4 5 6 7 8 9 0

ISBN 0-7355-3979-0

# 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.

# *Acknowledgments*

Barlow Burke acknowledges the helpful and patient research of four research assistants, Les Anderson, Athena Cheng, Stephanie Quaranta, and Rachel Rueben, while they were law students. He also acknowledges with appreciation the financial support over several summers, of the Washington College of Law, American University.

Joseph Snoe appreciates the efforts of Diane Wade, former Computer Services Librarian at Cumberland School of Law, for her assistance on graphics. He also thanks the Cumberland School of Law, Samford University, for its financial support while he worked on this manuscript.

We are both grateful for the guidance of the several anonymous reviewers of this manuscript provided by Aspen Publishers, the many comments of students and professors on the first edition, and for the editorial work of Carol McGeehan, Jessica Barmack, Eric Holt, John Lyman, Vincent Nordhaus, Sarah Zobel, and Margaret Rehberger at Aspen — all gave their professional best. 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 the improvement of this second edition.

B. B.

J. S.

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 2004

---

## About Aspen Publishers

Aspen Publishers, headquartered in New York City, is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, our products consist of analytical and practical information covering both U.S. and international topics. We publish in the full range of formats, including updated manuals, books, periodicals, CDs, and online products.

Our proprietary content is complemented by 2,500 legal databases, containing over 11 million documents, available through our Loislaw division. Aspen Publishers also offers a wide range of topical legal and business databases linked to Loislaw's primary material. Our mission is to provide accurate, timely, and authoritative content in easily accessible formats, supported by unmatched customer care.

To order any Aspen Publishers title, go to *[www.aspenpublishers.com](http://www.aspenpublishers.com)* or call 1-800-638-8437.

To reinstate your manual update service, call 1-800-638-8437.

For more information on Loislaw products, go to *[www.loislaw.com](http://www.loislaw.com)* or call 1-800-364-2512.

For Customer Care issues, e-mail *[CustomerCare@aspenpublishers.com](mailto:CustomerCare@aspenpublishers.com)*; call 1-800-234-1660; or fax 1-800-901-9075.

**Aspen Publishers**  
**A Wolters Kluwer Company**

---

# Summary of Contents

<i>Contents</i>	<i>ix</i>
<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxi</i>
<b>PART ONE: Possession, Personal Property, and Adverse Possession</b>	<b>1</b>
1. The Law of Property	3
2. Personal Property and Possession	13
3. The Law of Finders and Prior Possessors	29
4. Bailments	41
5. Good Faith or Bona Fide Purchasers	53
6. Gifts	61
7. Fixtures	69
8. Adverse Possession	73
<b>PART TWO: Common Law Estates and Interests in Real Property</b>	<b>105</b>
9. Common Law Estates and Present Interests	107
10. Future Interests	129
11. Special Rules of Construction	151
12. The Rule Against Perpetuities	161
13. Concurrent Ownership	185
14. Marital Property	209
<b>PART THREE: The Law of Landlord and Tenant</b>	<b>223</b>
15. The Landlord and Tenant Relationship	225
16. Transfers of the Lease	239
17. Waste, Repair, and Destruction of Leased Premises	251
18. Termination and Abandonment of the Lease	259
19. Achieving Habitable Premises	271
20. Premise Liability of Landlords	293
21. The Holdover Tenant and Concluding Comments	301
<b>PART FOUR: Transfers of Land</b>	<b>309</b>
22. The Sales Contract	311
23. Executory Period Issues	327
24. Real Estate Closings	349
25. Post-Closing Title Assurances	369
26. The Recording Systems	391
<b>PART FIVE: Private Land Use Controls</b>	<b>421</b>
27. Private Nuisance	423
28. Creation of Easements	433
29. Assignability, Scope, and Termination of Easements	459



30. Real Covenants and Equitable Servitudes: Running with the Land	477
31. Real Covenants and Equitable Servitudes: Common Schemes and Termination	497
<b>PART SIX: Public Land Use Controls</b>	<b>515</b>
32. Constitutional and Statutory Constraints on Zoning	517
33. Variances, Special Exceptions, and Zoning Amendments	531
34. Selected Challenges to Zoning Ordinances	551
35. Takings	573
<i>Table of Cases</i>	<i>599</i>
<i>Index</i>	<i>603</i>

# Contents

<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxi</i>

## PART ONE

### *Possession, Personal Property, and Adverse Possession*

<b>CHAPTER 1: The Law of Property</b>	<b>3</b>
Introduction	3
Common Law Cases	5
Case Analysis	8
 <b>CHAPTER 2: Personal Property and Possession</b>	 <b>13</b>
Introduction and Definitions	13
Possession, Relativity of Title, and First-in-Time	14
Actual Possession and the Fox Case	15
Constructive Possession	16
Custom	17
More Uses for the Doctrine of Custom	19
Natural Resources and Other Concerns	19
Water Law	20
(a) Surface waters	20
(b) Groundwater	20
Actionable Interference	21
Misappropriation	22
 <b>CHAPTER 3: The Law of Finders and Prior Possessors</b>	 <b>29</b>
Conversion, Replevin, and Trover	31
Armory v. Delamirie	31
Extensions of the Armory Rule — and a Right of Subrogation	32
Lost Property, Mislaid Property, Abandoned Property, and Treasure Trove	32
Other Considerations	34
Instrumental View	35
Legislation	35
 <b>CHAPTER 4: Bailments</b>	 <b>41</b>
Definition	41
Overview of Negligence and Strict Liability	43
Specialized Bailment Issues	43
(a) Pledges	43
(b) Park-and-Lock Cases	44
(c) Safe Deposit Boxes	45

Misdelivery of Bailed Property	45
(a) Strict Liability and Negligence	45
(b) Burden of Proof	45
(c) What Must Be Redelivered	46
When Bailed Property Is Lost or Damaged	47
<b>CHAPTER 5: Good Faith or Bona Fide Purchasers</b>	<b>53</b>
Voidable Title and Bona Fide Purchasers	53
The UCC and Bona Fide Purchasers	55
Entrustment	56
<b>CHAPTER 6: Gifts</b>	<b>61</b>
Inter Vivos Gifts	61
(a) Donative Intent	61
(b) Delivery	62
(c) Acceptance	63
Gifts Causa Mortis	64
<b>CHAPTER 7: Fixtures</b>	<b>69</b>
<b>CHAPTER 8: Adverse Possession</b>	<b>73</b>
Introduction	73
Elements of Adverse Possession	75
(a) Actual Possession	76
(b) Open and Notorious Possession	78
(c) Exclusive Possession	78
(d) Hostile or Adverse Possession	79
(e) Continuous Possession	80
Privity and Tacking	81
Disabilities and Tolling the Running of the Statute of Limitations	81
Life Tenants and Remaindermen	82
<b>PART TWO</b>	
<i>Common Law Estates and Interests in Real Property</i>	
<b>CHAPTER 9: Common Law Estates and Present Interests</b>	<b>107</b>
Some History	107
Estates: Some Fundamentals	108
Estates and Interests	109
What to Look for in Studying Freehold Estates	110
(a) Fee Simple Absolute	111
(b) Life Estate	112
(c) Fee Tail and Fee Simple Conditional	114
Waste	115
(a) Voluntary, Permissive, and Ameliorating Waste	115
(b) Open Mines Doctrine	116
(c) Economic Waste	117

Defeasible Fee Simple Estates	117
(a) Fee Simple Determinable	118
(b) Fee Simple Subject to a Condition Subsequent	119
(c) Distinguishing a Fee Simple Determinable From a Fee Simple Subject to a Condition Subsequent From a Covenant	120
(d) Fee Simple Subject to an Executory Limitation	121
Classifying Estates in Fee Simple	121
<b>CHAPTER 10: Future Interests</b>	<b>129</b>
Introduction	129
Distinguishing Present Interests and Future Interests	129
Future Interests Retained by the Grantor or Transferor	130
Future Interests in Third-Party Transferees	131
(a) Remainders	131
(b) Executory Interests	132
Vested and Contingent Remainders	133
(a) Ascertained Persons	133
(b) No Condition Precedent	134
Practice Interpreting Grants with Conditions	
Precedent and Conditions Subsequent	135
Alternative Contingent Remainders	136
Why We Distinguish Vested and Contingent Remainders	137
Executory Interests	138
Variations on Vested Remainders	139
(a) Indefeasibly Vested Remainder	139
(b) Vested Remainder Subject to Divestment	140
(c) Vested Remainder Subject to Open	141
<b>CHAPTER 11: Special Rules of Construction</b>	<b>151</b>
The Rule of Destructibility of Contingent Remainders	151
The Merger Rule	153
The Rule in Shelley's Case	154
The Doctrine of Worthier Title	156
(a) Inter Vivos Branch	156
(b) Testamentary Branch	157
<b>CHAPTER 12: The Rule Against Perpetuities</b>	<b>161</b>
The Rule Against Perpetuities	161
Interests Not Affected	162
Interests Affected	162
Interests Dependent on an Event	165
Grantee Identified by Description Rather Than Named	168
Intergenerational Family Transfers	169
Effect of Class Closing Rules	171
Commercial Options	174
Statutory Reforms of the Rule	175

(a) Wait-and-See Doctrine	175
(b) Cy Pres Doctrine	175
<b>CHAPTER 13: Concurrent Ownership</b>	<b>185</b>
Tenancy in Common	185
Joint Tenancy with Right of Survivorship	186
Distinguishing Joint Tenancies from Tenancies in Common	188
Severance	189
(a) Leases	190
(b) Mortgages	190
(c) Unilateral and Secret Severances	191
Tenancy by the Entirety	192
Rights and Obligations Between Co-tenants	193
(a) Possession and Ouster	193
(b) Contribution	194
(c) An Accounting	195
(d) Final Settlement on Sale	196
(e) Tax Sales and Foreclosure Sales	196
(f) Adverse Possession	197
Partition	197
(a) Partition in Kind	197
(b) Partition by Sale	198
<b>CHAPTER 14: Marital Property</b>	<b>209</b>
Common Law Dower	209
Dower Reform	210
The Elements of Dower	210
Dower and Adverse Possession	211
Dower and Waste	212
Release of Dower	212
Barring Dower	212
Forcing an Election	212
Curtesy	212
The Modern Elective Share	214
Calculating the Amount of the Elective Share	214
Homesteads	215
Community Property	216
<b>PART THREE</b>	
<i>The Law of Landlord and Tenant</i>	
<b>CHAPTER 15: The Landlord and Tenant Relationship</b>	<b>225</b>
Types of Leases	225
(a) Term for Years	225
(b) Periodic Tenancy	226
(c) Tenancy at Will	227
(d) Tenancy at Sufferance	227

The Landlord's Duty to Deliver Possession	229
The Holdover Tenant (Briefly Now — More Later)	230
<b>CHAPTER 16: Transfers of the Lease</b>	<b>239</b>
Privity of Contract and Privity of Estate	239
Assignments and Subleases	239
The Traditional Rule	240
Rule of Intent	240
The Effect of Tenant Transfers on Privity	241
Real Covenants	242
Landlord's Consent to a Sublease or Assignment	243
Landlord Consent Provisions	243
The Rule of Dumpor's Case	245
Transfers of the Landlord's Interest	245
<b>CHAPTER 17: Waste, Duty to Repair, Destruction of Leased Premises, and Security Deposits</b>	<b>251</b>
Waste	251
The Measure of Damages for Waste	252
Fixtures	252
The Duty to Repair	253
The Destruction of the Premises	254
(a) Termination of the Lease	254
(b) Duty to Rebuild	254
Security Deposits	255
<b>CHAPTER 18: Termination and Abandonment of the Lease</b>	<b>259</b>
Landlord Eviction of Tenant in Default	259
Self-help	259
Ejectment	260
Summary Possession Statutes	261
Tenant's Abandonment and Surrender	263
Surrender	263
Abandonment	263
(a) Lease Continues; Landlord Does Nothing	264
(b) Landlord Relets on Tenant's Behalf	264
(c) Landlord Treats Abandonment as Surrender	265
(d) Abandonment as Anticipatory Repudiation	266
<b>CHAPTER 19: Achieving Habitable Premises</b>	<b>271</b>
Evictions — Actual and Otherwise	271
Actual Eviction	271
Constructive Eviction	271
The Covenant of Quiet Enjoyment	272
The Tenant's Dilemma	273
Scope of the Covenant of Quiet Enjoyment	274
Partial Constructive Eviction	274

Partial Actual Eviction	274
The Implied Warranty of Habitability	275
Basis for the Warranty of Habitability	276
A Breach of the Warranty	277
Commercial Tenants and the Warranty of Suitability	277
Enforcement Remedies	277
Damages	278
Withholding Rent	278
Retaliatory Eviction as a Tenant's Defense to Eviction	279
Modifications to the Retaliatory Eviction Defense	280
Illegal and Frustrated Leases	281
The Illegal Lease	281
Frustration of Purpose	282
<b>CHAPTER 20: Premises Liability of Landlords</b>	<b>293</b>
(a) Landlord Liable for Injuries in Specific Situations	293
(b) Landlord Liable Under Negligence Standard	294
(c) Landlord Strictly Liable	295
Landlord Liability for Criminal Acts	295
Exculpatory Clauses	296
<b>CHAPTER 21: The Holdover Tenant and Concluding Comments</b>	<b>301</b>
Statutory Modification	303
Exceptions	303
Concluding Comments on Leases as a Contract or Conveyance	304
<b>PART FOUR</b>	
<i>Transfers of Land</i>	
<b>CHAPTER 22: The Sales Contract</b>	<b>311</b>
Introduction	311
Closing	312
Remedies for Breach	313
Real Estate Brokers and Agents	313
Broker as Seller's Agent	315
Broker's Duty to Disclose Latent Defects to Purchasers	316
The Statute of Frauds	317
Part Performance and Other Exceptions	318
(a) Part Performance	318
(b) Equitable Estoppel or Equitable Fraud	319
(c) Unequivocal Reference to Oral Contract	319
<b>CHAPTER 23: Executory Period Issues</b>	<b>327</b>
Introduction	327
Marketable Title	328
(a) Definition of Marketable Title	328
(b) Examples of Unmarketable Title	328
(c) Defective Deed Records	330

(d) Violations of Covenants, Ordinances, Regulations, or Other Laws	331
(e) Adverse Possession	332
(f) Landlocked Property	332
Caveat Emptor and the Duty to Disclose Defects	333
(a) Caveat Emptor	333
(b) The Duty to Disclose Material Latent Defects	334
Time for Performance	334
Remedies for Breach of Sales Contract	335
Equitable Conversion and Risk of Loss	336
 <b>CHAPTER 24: Real Estate Closings</b>	 <b>349</b>
The Closing or Settlement Process	349
Delivery	350
(a) Sales and Commercial Transfers	351
(b) Donative and Testamentary Transfers	352
Mortgages	354
(a) Mechanics of Mortgages	354
(b) Title Theory and Lien Theory	355
(c) Deed of Trust	356
(d) Installment Sales Contract (Contract for Deed)	356
(e) Debt Satisfaction and Assumptions	357
(f) Foreclosure	357
 <b>CHAPTER 25: Post-Closing Title Assurances</b>	 <b>369</b>
Merger Doctrine	369
Types of Deeds	369
Deed Covenants	370
Present Covenants	372
(a) Seisen	372
(b) Right to Convey	372
(c) Warranty Against Encumbrances	372
Future Covenants	373
(a) Warranty	373
(b) Quiet Enjoyment	373
(c) Further Assurances	374
Damages	374
Attorney Fees	375
Remote Grantees	376
Implied Warranty of Quality	377
After Acquired Title (Estoppel by Deed)	379
 <b>CHAPTER 26: The Recording Systems</b>	 <b>391</b>
Introduction	391
Searching a Chain of Title Using the Grantee Index	393
Searching a Chain of Title Using the Grantor Index	394
Searching a Tract Index	394
The Recording Acts	395



Race or Pure Race Statute	395
Race-Notice Statute	396
(a) Actual Notice	397
(b) Constructive Notice	397
(c) Inquiry Notice	398
Notice or Pure Notice Statute	399
Purchasers for Value	400
Problems in Grantor-Grantee	401
Marketable Title Acts	402
Title Insurance	404
(a) Informational Use	404
(b) Lender's Policy and Owner's Policy	405
(c) No Assignment or Running of Benefits	405
(d) Insurer's Duty to Disclose Excepted Defects	405
(e) Damages	405
(f) Other Benefits of Title Insurance	406

## PART FIVE

### *Private Land Use Controls*

<b>CHAPTER 27: Private Nuisance</b>	<b>423</b>
Introduction	423
Intentional and Unintentional Interferences	424
Substantial Interference	425
Unreasonable Interference	425
Injunctions and Damages	426
<b>CHAPTER 28: Creation of Easements</b>	<b>433</b>
Introduction	433
Terminology	434
Express Easements	436
Easements by Estoppel and Irrevocable Licenses	437
Implied Easements	439
Easements Implied from Prior Use	440
Easements Implied by Necessity	442
Prescriptive Easements	443
(a) Actual Use	443
(b) Open and Notorious Use	444
(c) Hostile Use (Adverse Use) (Claim of Right)	444
(d) Continuous and Uninterrupted Use	445
(e) Exclusive Use	446
(f) Statutory Prescriptive Period	446
<b>CHAPTER 29: Assignability, Scope, and Termination of Easements</b>	<b>459</b>
Assignability of Easements	459
Divisibility and Apportionment	460
(a) Easements Appurtenant	460