

**DUKEMINIER
KRIER**

PROPERTY



**Little
and Company**

PROPERTY

Jesse Dukeminier

Professor of Law
University of California
Los Angeles

James E. Krier

Professor of Law
University of California
Los Angeles



Little, Brown and Company
Boston and Toronto

Copyright © 1981 by Jesse Dukeminier and James E. Krier
All rights reserved. No part of this book may be reproduced in any
form or by any electronic or mechanical means including
information storage and retrieval systems without permission in
writing from the publisher, except by a reviewer who may quote
brief passages in a review.

Library of Congress Catalog Card No. 80-84030

Seventh Printing

HAL
Published simultaneously in Canada
by Little, Brown and Company (Canada) Limited
Printed in the United States of America

PROPERTY

Editorial Advisory Board

Little, Brown and Company
Law Book Division

A. James Casner, *Chairman*
Austin Wakeman Scott Professor of Law, Emeritus,
Harvard University

Francis A. Allen
Edson R. Sunderland Professor of Law,
University of Michigan

Clark Byse
Byrne Professor of Administrative Law,
Harvard University

Thomas Ehrlich
Professor of Law, Stanford University (on leave)
Director, International Development Cooperation Agency

Geoffrey C. Hazard, Jr.
John A. Garver Professor of Law,
Yale University

William L.M. Reese
Charles Evans Hughes Professor of Law and Director,
Parker School of Foreign and Comparative Law,
Columbia University

Bernard Wolfman
Fessenden Professor of Law,
Harvard University

For David,
and for
Wendy and Andrew

Preface

Property is a thoroughly modern subject of thoroughly antiquated origins. Probably in no other area of law does one see more, or even as many, strains of the old in the new. As an institution for allocating resources and distributing wealth and power, property bears in fundamentally important ways on central issues in contemporary life; as a body of doctrine, it discharges these modern-day tasks with rules and concepts drawn from age-old ways of looking at social relations in an ordered society. Property law has, to be sure, undergone constant change, but — at least in Anglo-American experience — it has not been revolutionized. Its enduring mix of old and new, rife with uneasy tensions, reflects more than an institution that has evolved over centuries and across cultures; it reflects as well two often conflicting objectives — promoting stability and accommodating change — that property systems must serve. To study property is to study social history, social relations, and social reform.

It is also, of course, to study law. The primary objective of this coursebook is to help students learn the complicated structure and functions of property doctrine and something of legal method, legal reasoning, and legal analysis. We have, however, secondary objectives as well, suggested by our opening remarks. How, why, and with what implications does the property system order relations in present-day America? What sorts of incentives does it create in terms of constructive use of scarce, valuable resources? How fairly does it confer benefits and impose burdens? To what extent is today's system a valuable, or a useless, legacy of the past? What sorts of reforms are suggested, and what might they achieve?

To pursue such secondary questions as these, and especially to accomplish the primary end of learning law and legal method, we need large doses of doctrinal learning, but also a sense of history and of methods of critiquing institutional performance. There is, then, lots of law in what follows — in cases, statutes, text, and problems. There is also a consistent effort to trace historical antecedents. Finally, there is a fairly systematic, but by no means dominating, attempt to critique — often through an economic lens. Economics, like property, is in large part about resources. The economics in the book can be managed easily, we think, even by the totally uninitiated; it can also be ignored or even scorned. So too for the history, if one likes.

Though the organization and coverage of this book will be generally familiar to teachers, there are occasional departures from convention. For example, we put the study of landlord and tenant law before that of freeholds, and we approach servitudes from comparative and functional perspectives rather than in terms of doctrinal pockets. If departures like these are not to the taste of teachers, rearrangement is easily accomplished.

This book owes a large debt to colleagues and students at UCLA and Stanford, to one student — Stephen Heller — in particular, to our secretaries Jean Castle, Betty Dirstine, and Dorothy Goldman, and to the staff at Little, Brown, especially our editor, Allen Wheatcroft.

Jesse Dukeminier
James E. Krier

February 1, 1981

PROPERTY

Summary of Contents

Preface	xxvii
Part I. An Introduction to Some Fundamentals	1
Chapter 1. Acquisition of Property Other than by Voluntary Transfer	3
Part II. The System of Estates	131
Chapter 2. The Leasehold Estates: Tradition, Tension, and Change in Landlord-Tenant Law	133
Chapter 3. Possessory Estates (Leaseholds Aside)	350
Chapter 4. Future Interests	409
Chapter 5. Co-Ownership and Marital Interests	485
Part III. Voluntary Transfer of Property: Herein Mostly Sales of Land	587
Chapter 6. Transfer by Sale and by Gift	589
Chapter 7. Methods of Title Assurance	727
Part IV. More on Voluntary and Involuntary Transfer: Control of Land Use through "Private" and "Public" Means	915
Chapter 8. Nuisances Private and Public	917
Chapter 9. Private Land-Use Arrangements: A Comparative Study of Servitudes	959
Chapter 10. Eminent Domain and the Implicit Taking Problem	1093
Chapter 11. Zoning Processes, Practices, and Problems	1212
Acknowledgments	1423
Table of Cases	1429
Index	1441

Contents

Preface

xxvii

Part I. An Introduction to Some Fundamentals 1

Chapter 1. Acquisition of Property Other than by Voluntary Transfer 3

A. Ownership and Possession: The Law of Finders 3

Armory v. Delamirie 4

Notes and Questions 4

Note: The Duties and Rights of Finders and Other Bailees 8

Problem 11

Hannah v. Peel 11

Notes and Questions 18

McAvoy v. Medina 20

Notes and Questions 21

Paset v. Old Orchard Bank & Trust Co. 26

Notes and Questions 33

B. The Rule of Capture 34

Pierson v. Post 34

Note 38

Questions and Problems: The Law of "Wild Animals" 40

Hammonds v. Central Kentucky

Natural Gas Co. 41

Notes and Questions 44

Demsetz, Toward a Theory of Property Rights 45

Note: "Externalities" 52

Notes and Questions 57

	Notes: Perspectives on Private Property	59
C.	Acquisition of Water Rights	64
	Restatement (Second) of Torts	64
	Notes	67
	Problems	68
	<i>Coffin v. The Left Hand Ditch Co.</i>	68
	Notes and Questions	71
	Gaffney, Economic Aspects of Water Resource Policy	72
	<i>Higday v. Nickolaus</i>	76
	Note	78
	Notes: Increase, Accretion, Accession, Confusion	78
D.	Adverse Possession	82
1.	The Theory and Elements of Adverse Possession	82
	R. Powell, Real Property	82
	Holmes, The Path of the Law	83
	Ballantine, Title by Adverse Possession	84
	<i>Van Valkenburgh v. Lutz</i>	85
	Notes and Questions	94
	Problems	97
	Note: Color of Title and Constructive Adverse Possession	98
	Problems	99
	Notes: Squatters	100
2.	The Mechanics of Adverse Possession	103
	<i>Howard v. Kunto</i>	103
	Note	108
	Problems: Tacking	108
	Note: Improvements and Encroachments	109
	Problems: Disabilities	110
	Problem: The Title of the Adverse Possessor	111
	Note: Prescription	112
3.	Adverse Possession against the Government	112
	Note: Indian Titles and Adverse Possession	113
4.	Adverse Possession of Chattels	114
	<i>O'Keeffe v. Snyder</i>	114
	Notes and Questions	128

Part II. The System of Estates 131

Chapter 2. The Leasehold Estates: Tradition, Tension, and Change in Landlord- Tenant Law	133
A. The Leasehold Estates	133
1. The Term of Years	134
2. The Periodic Tenancy	134
3. The Tenancy at Will	135
4. The Tenancy at Sufferance	135
Problems	135
B. The Lease	136
<i>Arthur Treacher's Fish & Chips of Fairfax, Inc. v. Chillum Terrace Limited Partnership</i>	136
Notes and Questions	142
Problem	147
C. Selection of Tenants	148
The Fair Housing Act	148
Note	150
Problems	151
<i>Robinson v. 12 Lofts Realty, Inc.</i>	151
Notes	165
<i>Kramarsky v. Stahl Management</i>	166
Note	169
D. Delivery of Possession	169
<i>Hannan v. Dusch</i>	169
Notes and Questions	173
Problems	174
E. Assignments and Subleases	175
<i>Ernst v. Conditt</i>	175
Notes and Problems	181
<i>Jacobs v. Klawans</i>	183
<i>Ringwood Associates, Ltd. v. Jack's of Route 23, Inc.</i>	184
Notes and Questions	192
Problems	193
F. Tenant's Duties; Landlord's Rights and Remedies	194
1. The Duty Not to Commit Waste	194
<i>Rumiche Corp. v. Eisenreich</i>	194
Notes and Questions	199
Mitchell, When Housing Is Tight, Are Rent Controls Necessary?	200

2. The Duty to Repair (and Related Problems)	203
<i>Patton v. United States</i>	203
Notes and Questions	208
<i>Albert M. Greenfield & Co., Inc. v. Kolea</i>	209
Notes and Questions	213
Note: Frustration of Purpose (Impossibility of Performance)	214
3. The Holdover Tenant	214
<i>Crechale & Polles, Inc. v. Smith</i>	215
Notes and Questions	218
4. The Defaulting Tenant	220
a. The Tenant in Possession	220
<i>Berg v. Wiley</i>	220
Notes and Questions	227
Note: Summary Proceedings	229
Note: Landlord's Remedies in Addition to Eviction	231
b. The Tenant Who Has Abandoned Possession	232
<i>Whitehorn v. Dickerson</i>	232
Notes and Questions	237
<i>Sommer v. Kridel</i>	240
Notes and Questions	247
Notes: Landlord's Remedies and Security Devices	248
G. Landlord's Duties; Tenant's Rights and Remedies	252
1. The Common Law Background: Caveat Lessee	253
Abbott, Housing Policy, Housing Codes, and Tenant Remedies: An Integration	253
Notes	253
2. The Conventional Law	254
a. Condition of the Premises Generally	254
<i>Ingalls v. Hobbs</i>	254
Notes	256
b. Landlord's Tort Liability	257
<i>Jordan v. Savage</i>	257
Notes and Questions	261
Problems	261
Note: Exculpatory Clauses	262
<i>Henriouille v. Marin Ventures, Inc.</i>	263
<i>O'Callaghan v. Waller & Beckwith Realty Co.</i>	264

	Cardona v. Eden Realty Co.	265
c.	Quiet Enjoyment and Constructive Eviction	266
	<i>Bruckner v. Helfaer</i>	266
	Notes and Questions	268
	<i>Reste Realty Corp. v. Cooper</i>	269
	Notes and Questions	276
	<i>East Haven Associates v. Gurian</i>	276
	Notes and Questions	281
	Note: Tenant Remedies under Conventional Law	281
3.	Reforms and Implications	283
a.	The Illegal Lease	283
	<i>Brown v. Southall Realty Co.</i>	283
	Notes and Questions	285
b.	The Implied Warranty of Habitability	286
	<i>Green v. Superior Court of the City and County of San Francisco</i>	286
	Notes and Questions	301
	Note: Tort Implications of the Implied Warranty of Habitability	307
c.	Retaliatory Eviction	309
	<i>Edwards v. Habib</i>	309
	Notes	312
	Note: Procedures for Resolving Landlord-Tenant Disputes	316
d.	The Implications of Reform	316
	Cunningham, The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status	317
	Notes and Questions	325
H.	Government Support of Housing	326
1.	Housing Programs	326
	Congressional Budget Office, Federal Housing Policy: Current Programs and Recurring Issues	326
	Notes	330
2.	Housing Location	333
	<i>Blackshear Residents Organization v. Housing Authority of the City of Austin</i>	333
	Notes	336
3.	Housing Quality	337

	<i>Alexander v. HUD</i>	337
	Notes and Questions	340
4.	Questions of Due Process	341
	Note, Procedural Due Process in Government-Subsidized Housing	341
	<i>Geneva Towers Tenants Organization v. Federated Mortgage Investors</i>	343
	Notes	348
Chapter 3.	Possessory Estates (Leaseholds Aside)	350
A.	Up From Feudalism	350
1.	Tenure	350
2.	Feudal Tenures and Services	352
a.	Free Tenures	352
	(1) Military Tenures	352
	(2) Economic Tenure (or Socage)	353
	(3) Religious Tenures	353
b.	Unfree Tenure: Villeinage	353
3.	Feudal Incidents	354
a.	Homage and Fealty	355
b.	Aids	356
c.	Forfeiture	356
d.	Liabilities at Death of Tenant	356
4.	Avoidance of Taxes (i.e., Feudal Incidents)	357
5.	Statute Quia Emptores (1290)	358
6.	The Decline of Feudalism	359
	W. Cunningham, The Growth of English Industry and Commerce	359
	H. Maine, Ancient Law	361
	Questions	362
B.	The Fee Simple	362
1.	Introduction	362
a.	Rise of Heritability	362
b.	Rise of Alienability	363
c.	Rise of the Fee Simple Estate	363
d.	Creation of a Fee Simple	364
	Problems	365
e.	Inheritance of a Fee Simple	365
	Problems and Note	367
2.	Defeasible Fees	368

	Problem	371
	<i>Mountain Brow Lodge No. 82,</i> <i>Independent Order of Odd Fellows</i> <i>v. Toscano</i>	372
	Notes and Questions	377
C. The Fee Tail		380
	Problems	384
D. The Life Estate		384
	Problems	385
	<i>Baker v. Weedon</i>	386
	Notes and Questions	390
E. Leasehold Estates		396
	Problem	396
F. Cooperatives and Condominiums		396
	<i>Gale v. York Center Community</i> <i>Cooperative</i>	396
	Notes and Questions	401
	Note: Conversion of Rental Apartments into Condominiums	405
	Problems	406
	Note: Time-Sharing Interests	406
 Chapter 4. Future Interests		 409
A. Introduction		409
B. Future Interests in the Transferor		410
1. Reversion		410
	Problems	411
2. Possibility of Reverter		411
	Problem	412
3. Right of Entry		412
	Problem	413
	<i>Ink v. City of Canton</i>	414
	Questions	420
	Note: Valuation of Future Interests	420
C. Future Interests in Transferees		421
1. Remainders		422
	Problem	422
	Problems	424
	<i>Browning v. Sacrison</i>	425
	Notes and Questions	428