

FUNDAMENTALS OF MODERN PROPERTY LAW

SIXTH EDITION

EDWARD H. RABIN

ROBERTA ROSENTHAL KWALL

JEFFREY L. KWALL

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To Jane
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To Shanna, Rachel & Nisa
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To Mom and Dad
CAA

PREFACE

Property law has something for everyone. For the traditionalist, it oozes with tradition. For the reformer, it cries out for reform. For all of us, it embodies the often unexpressed assumptions on which our society rests.

Continuing in the tradition of the five prior editions, this sixth edition uses a problem approach to learning. The law is not merely a body of general principles; rather, general principles must be applied to specific facts. The lawyer is always faced with a specific problem that she or he hopes to solve through the use of cases, statutes, and other legal materials. The law student, like the lawyer, should learn as soon as possible to operate in a similar context. We use the problem method to achieve this goal.

The sixth edition tracks contemporary trends and changes in many areas of property law, giving particular attention to emerging issues of environmental sustainability. The Assignments on the government regulation of property have been restructured, with new Assignments on Zoning and Land Use Regulation, Water Rights and the Public Trust, and Environmentally Sensitive Lands. These Assignments reflect the “greening” of property law and the relevance of these issues to students. For example, the Assignment on Water Rights and the Public Trust calls attention to the fact that property law principles govern the allocation, use, and conservation of a resource that is necessary for all biological life and for the survival of society: water. However, the new Assignments also facilitate exploration of core property concepts: rule-of-capture, first-in-time priority, appurtenancy, tort damages versus government regulation, negative externalities, cumulative harms, expectations-based rights, the morality of property, security and stability of property rights versus adaptive evolution of property (both gradual and rapid), the relative roles of legislative bodies and courts in changing property law, and the mix of public and private characteristics of property. In addition, specific environmental issues have been added to existing Assignments: conservation duties to future generations in the Assignment on the doctrine of waste; conservation easements in several of the easement Assignments; the use of nuisance law to remedy environmental harms, including climate change; environmental justice issues in the Assignment on land use discrimination; and brownfields remediation and redevelopment in the context of liability for toxic contamination in real estate transactions.

In addition to increased attention to environmental, land use, and natural resources issues, this sixth edition perpetuates our emphasis on two other dimensions of property law. First, a comprehensive introduction to Intellectual Property law is provided. The novel legal problems raised by

advances in technology and the growth of the Internet demand that students receive early exposure to the burgeoning law of intangible property. Therefore, three Assignments dealing with Intellectual Property appear at the end of the casebook. Instructors may choose to assign them at any point in the course.

This edition also continues to emphasize a planning perspective. The first-year law curriculum tends to focus on controversies and may mislead students into thinking that lawyers spend all of their time resolving controversies. In fact, the majority of lawyers concentrate on planning to avoid controversies. Thus, law students should be sensitized to that perspective from the beginning of law school. For example, rather than focusing only on how a dispute between a landlord and a tenant will be resolved, it is important to consider how the underlying lease might have been drafted to avoid the dispute. This planning perspective is explored in many contexts throughout the sixth edition.

Like the prior five editions, this sixth edition is divided into Assignments. An average Assignment should take between one and three hours of class time, depending on the desired depth of treatment. The subjects covered are fundamental to the work of the modern practicing attorney. We have attempted to cover the material now covered by the real property portion of the multi-state bar examination, and to introduce students to subject areas covered by more advanced courses (such as Intellectual Property Law, Tax Law and Environmental Law). Subjects of mainly historical interest have been de-emphasized.

Most of the cases and other material have been liberally abridged. Major deletions are indicated by an ellipsis. Many of the original footnotes in the cases have been deleted and those that remain are numbered consecutively, rather than preserving the original numbering from the case. Editorial additions are designated as such.

We owe gratitude to many individuals. Professor R. Kwall expresses her appreciation to her research assistants Michael Brower, Eri Iwakuni, Daniel Lano, Zachary Lynn, Nicholas Restauri, Austin Stephenson and Aaron White, and to DePaul University College of Law for research support. Professor J. Kwall thanks his research assistants Joseph Cronin, Lauren Dempster, Aaron Eisenberg, Maureen McKenzie, Maureen Reynolds and Janet Soave, and acknowledges Dean David Yellen and Associate Dean Michael Kaufman for their encouragement and Loyola University Chicago School of Law for research support. Professor Arnold is grateful for

the opportunities to work on this casebook while serving as a Visiting Scholar at the University of Cincinnati School of Planning in 2008–2009, the Huber Hurst Visiting Eminent Scholar at the University of Florida Levin College of Law in Fall 2009, and the *Environmental & Energy Law & Policy Journal* Symposium Visiting Professor at the University of Houston Law Center in Spring 2010.

Let us now begin our study.

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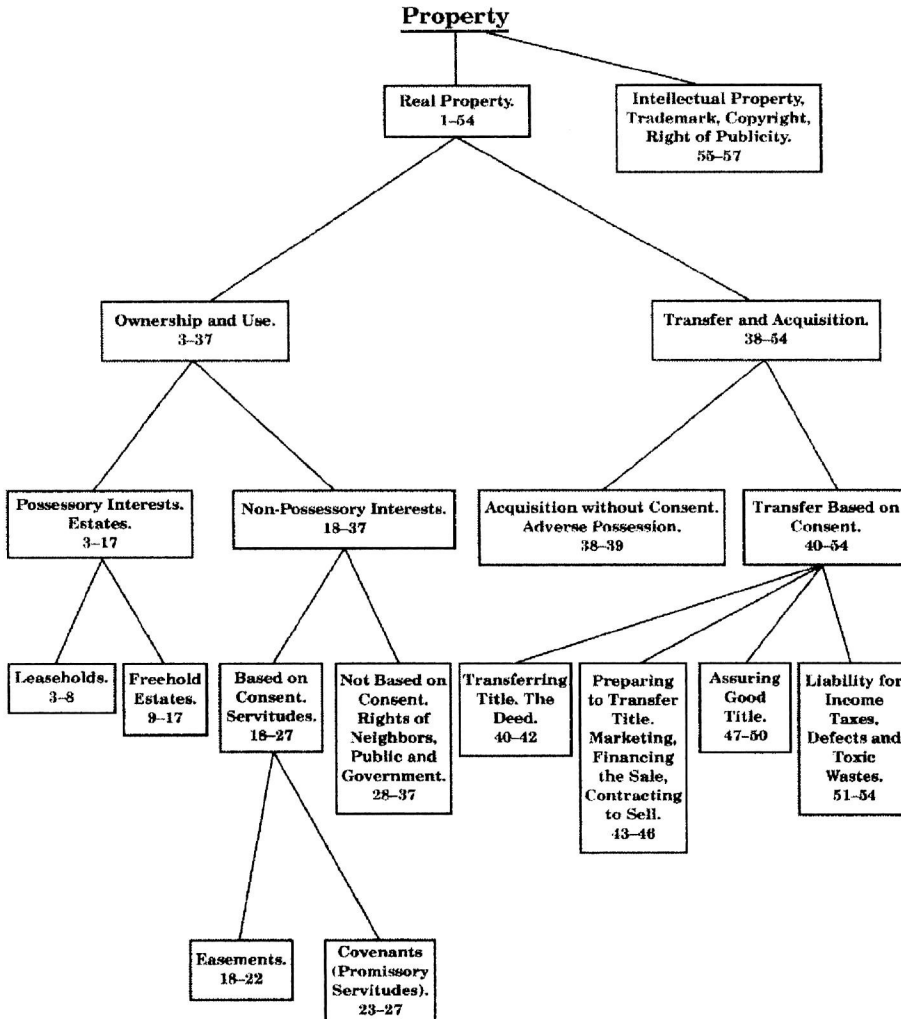
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January, 2011

SCOPE OF BOOK: OVERVIEW



Number references are to Assignments.

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Eric T. Freyfogle, “The Owning and Taking of Environmentally Sensitive Lands,” 43 *UCLA Law Review* 77 (1995), excerpts reprinted with permission of Eric T. Freyfogle.

J.B. Ruhl, “Making Nuisance Ecological,” 58 *Case Western Reserve Law Review* 753 (2008), excerpts reprinted with permission of J.B. Ruhl.

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