北京外国语大学法学精品教材

普通法案例教学系列英文教材

财产法

LAW OF PROPERTY

郑小军 / 著

中国法制出版社
CHINA LEGAL PUBLISHING HOUSE

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前 言

本书是北京外国语大学法学精品教材“普通法案例教学系列”的一本，是针对中国学生，经过北京外国语大学法学院十多年课堂教学经验的积累，在吸取国外法学教育方法中的有益成分的基础上编写而成的。其目的有二：一是大幅度提高学生的英语语言能力，二是深入而系统地了解普通法的精要。

英美财产法与侵权法和合同法一道，被视为普通法体系的根基或精髓（the backbone）。自1066年诺曼底人夺得英国王位以来，土地制度始终是英国社会的根本制度，在将近一千年的过程中，这一制度经历过若干重大变革，从“普天之下莫非王土”到封建贵族的分封制度，再经过工业革命，使土地成为商品，进入流通领域，这一过程经历数百年的缓慢变革，其间也发生过“革命”或战争，但总体上是以不流血形式完成的。

十六世纪以来，随着英国势力扩张到世界的每个角落，英国的财产制度也在所有英语国家延续下来。我们可以说，英国之所以能够战胜其他欧洲殖民帝国，很大程度上归功于它的政治、法律制度：当法国人在向印第安人展开贸易攻势、西班牙人疯狂掠夺南美的金银财宝时，英国人只做了一件事：建立自己的社区，这里有教堂、有学校、有军队、有法院，总而言之，有制度。这种制度缔造了大英帝国，使它有能力统治了世界两百多年。自第一次世界大战以来，英国逐渐让出了世界统治权，让给了它的“亲生儿子”美国。想一想，能够让一个民族统治世界长达三百多年的政治、法律体系，难道不值得我们认真仔细地去研究和学习吗？

本书与美国法学院所用的《财产法》教材相比，应该说是一种简化的教材，其阅读量要比美国法学院少得多，但难度是相似的。本书主要内容取自经过删节的法院判例，其语言难度要求学生达到大学英语4/6级或专业英语4

级（相当于英语本科二年级）水平。

普通法教学与大陆法系的教学方法之间最大的区别恐怕是案例教学法，学习普通法没有任何需要学生背诵的内容，但需要学生理解法律产生的背景及其实际应用的方式。

本书分为十四章，内容包括：财产法概述、占有、获得、所有者权益、赠与、遗产、未来权益、不确定权益、共同所有、土地租赁、地产交易、土地使用权的私人干预、司法干预、立法干预等。

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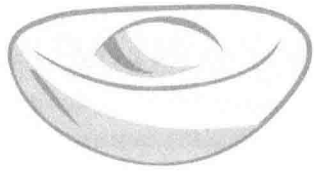
Chapter I

INTRODUCTION TO PROPERTY, COMMON LAW AND JUDICIAL SYSTEM

What is property, and what is property law?

Everyone has property, and everyone has some idea of what property law is, or should be. But not everyone is satisfied with the arrangement of properties; competing arguments arise over properties, and over proper arrangements of things; and the law of property evolves over the hundreds of years regulating different interests among individuals and between different individuals and governments.

If we say, "This is mine", we are claiming an ownership over "this" thing; and if we say, "Don't touch it", we are enforcing our claim of the property right. You can claim a lot of things, or the World, or the Universe, but you have to be able to enforce your claim before it becomes an actual property right.



The "property" and the "things" are different ideas, and are often misconceived as to what property really is. A lot of things existing in nature are unowned, owned, or disowned, but a property is always owned by someone. You may have something in your hand (in your possession, to be exact), but you don't necessarily have full ownership, or only have possessory right inferior to other people's superior rights. In other words, the physical things are arranged in objective orders of nature (even though through the hand of human interference), but the property is entirely a legal arrangement of human interests in things, which we will try to find some natural elements justifying such arrange-

ments.

Some people divide properties into "tangible" and "intangible" types, such as ownership in a house, or over a book, and proprietorship in a patent or a trademark. This is mistreatment of the property concept: all property rights are intangible; the subject matters under the right may be tangible (as in a house), or intangible (as in intellectual properties). In a sense, the Law of Property is not about things; it is about a "bundle of rights" over the things.

The property law is about how resources are distributed among individuals. Natural things exist with, or without, human interference; but properties are the creatures of human invention or intervention. A property may be created, transferred or conveyed, inherited, passed over as gifts, or abandoned or even destroyed by means of legal steps without destroying the actual thing. We all have the experience of buying something. The actual buying moment – handing over the money and receiving the purchase – may be governed by Contract Law, but the aftermath is governed by Property Law. Your buying not only creates a transfer of property, but also establishes entitlement to the purchase in your favor as a property right.

The property law is about how resources are regulated among individuals by the government. When a transfer takes place between private individuals – as, e.g., when you buy a book – you might think it's purely private action, an action entirely based on private consents: you ask for the price, agree to the price, and hand over the money to receive the book. But you may not be aware that this "private" action is always somehow regulated by a governmental force. For example, the money you pay is called the "legal tender" – an instrument for the exchange value of something. This instrument is issued by the government for a predetermined market value and none other. You cannot say, "My $10 bill is worth 20", even if the other person agrees to it. And there is more. You are not entirely free to buy and sell whatever you want to. The government has a heavy hand in regulating all private transactions. Sometimes, you've made a purchase over something, but you may not establish property right at all (e.g., a gun, or illegal substances). In a simple word, you can own property, simply because the government says so. This we will see in our case studies.

Why do we need to study common law property?

Property law evolved under the Anglo-American common law system is frequently referred to as the "backbone", along with Contracts and Torts. Many countries, France, Germany, and China included, have property law. Why do we pick the common law property for particular attention over the others?

Like torts and contracts, the individual behavior varies from case to case, and there can hardly be a general rule stating what is right and what is wrong. But indeed, there is some guidance for the individual behavior in all cases, which are highly case-specific. In this sense, we call such guidance the "unwritten" law, or the "common

law". Due to the voluminous contents, various efforts have been poured in to create a collective body of property law. So far it has not been completely successful. Or maybe, it is impractical to create such a gigantic compilation of rules, because the common law system of property law has been working properly. If such general guidance is verbalized, like the penal code of criminal law, it will be difficult to imagine the kind of inconvenience it might bring to society given the small benefit to lawyers and judges in court.

To a large extent, property problems cannot be predefined, or easily solved with predetermined general rules. This creates the headache for lawyers and judges with civil law mindset. If there are no definitive rules written in black and white, an issue would be considered as "unjusticiable" in court, which sounds like a "chicken or egg" problem.

Do we, the humans, act in some orderly fashion because there is a law that allows us to do so, or indeed, the law has to follow our footsteps? If the former, how can we act when there is no law that tells us to move forward? If the latter, how do we know, and who should tell us, that we have acted in a right or wrong way? In the common law solution, the "rules" are always there, like natural things, that we knowingly or unknowingly follow in our daily acts. This has been achieved by the judges' function in "finding the law."

A common law court, when faced with a problem, would first hear from the parties who present their "cases" – by telling their versions of the story from each side – which is the fact-finding process, through cross-examinations and witnesses' accounts of what has happened. The credibility of their story is evaluated by the twelve jurors, who will render a decision on facts, and then, under the instruction of law given by the court, decide on each legal issue. The "law" given here is the rule established in previous cases on identical or similar issues (not necessarily the same facts). Even if an issue has never been contemplated before (a case of first impression), the judge will not throw up his hands and dismiss the case for lack of proper legal rules. He will use his reasoning power to sum up a new rule by analyzing the facts.

Many important property law problems are solved this way, from a public nuisance that had an economic impact on an entire industry,[1] to landlord-tenant disputes that affects the societal infrastructure resulting from historical development.[2]

The common law system, evolved in England when the conquerors felt a need to balance the judicial practices under some kind of rules that should be "common" to all people, in all places, at all times, has been proven a working success. Although we frequently refer to it as Anglo-American legal system, it has actually been practiced in all English-speaking countries. That is to say, about half of the world's population live in the common law world, and its influence has been felt in many civil law jurisdictions.

1 See, *Boomer v. Atlantic Cement Co.*
2 See, *Hawaii Housing Authority v. Midkiff.*

The common law is not merely a set of rules different and separate from any other legal systems, such as the European continental law system. To a large extent, most common law rules have their counterparts in other legal systems. What is true under the common law is considered universally accepted. That's why it is called the "common" law. The common law is just supposedly the right way, recognized by most people through a judge, of carrying out daily routines. The judge does not create the rules, he "finds" them, as if to understand what has long been existing in nature. For example, when you owe money, you must repay it; if you don't like to be beaten, you shouldn't do it to others, and if you do, you should not be surprised if others to do the same to you (remember the Ten Commandments in the Bible?). And that's not all of it. If a judge makes a mistake, chances are that he would be corrected by his superior, the appellate court, and more importantly, he will be criticized; he will be ignored by his fellow judges; and no one will follow him, and in some instances, he will be denounced, and in rare cases, his decision will be overturned by a later court. That will prompt a judge to think carefully in reaching his decision: he would listen quietly to the stories of facts from both sides, their arguments together with witnesses to form sufficient evidence and place them on the record; he would search for the decisions made in the past to see if there has been any established rules to guide him, and if not, use his power of reason to develop a new rule, to be tested again, and again, in future cases, and once well tested, the rules would become "settled".

To a great extent, we can credit the English success to its legal system, and property law in particular. The English, by all means, were not the earliest in overseas expansion, but when she grabbed a foothold in the new Continent, the first thing her settlers did, unlike the Spanish or French adventurers who were more interested in seeking the gold and silver, was to set up communities with churches and courts – to establish law and order. Not only did they acquire new properties, but also they put the resources to great use. For this reason, the English settlements, relatively small though, would grow, to form the United States that eventually outran the race against the Spanish, the French, the Dutch, and many others for controlling the new world.

Moreover, for an obvious reason, we study the common law property for the proper language. What does it mean to "transfer from O to A and his heirs", and what is a "fee determinable on condition precedent (or condition subsequent)"? We often say "indeed, it's true" for emphasis. Why "indeed"? Many of the property law terms have survived hundreds of years and entered our daily use.

One thing, perhaps too philosophical to be considered among property law scholars and students, is the profound influence of the Anglo-American property regime upon the progress of history. The common law property system, developed over the hundred years in England, despite the political changes, remained unaffected; when the English colonial settlements were established in America, they not only brought their language, their religion and political systems to the new world, they also installed the English common law in the new land. Although the property systems in the two countries developed separately, especially after independence, and experienced

significant changes at various times, the basic principles were preserved, and that undisputedly formed the backbone of the national strengths of both countries politically, economically and socially.

In China, however, there has never been a consistent property system over the thousands of years of history. Land, for example, was divided among the kinsmen of a ruler in the earliest feudalistic period, very similar to that of the English property system after the Norman Conquest; after a few hundred years, land became much contested for, and this dispute over the feudalistic source of wealth in England was very well handled, with some turbulence, but not major social revolution, to usher in the industrial revolution. Yet, in China, such problems were nonetheless resolved, without exception, by social revolutions again and again, almost every other hundred years. Once a new ruler came to power, he and his followers would take everything of the country, including the land, and even the personal belongings of the previous regime. It is interesting to note that in China seldom do you see anything that has been owned by a single owner more than a hundred years. There may be other reasons for China's constant social revolutionaries (such as lack of restraint on the absolute powers), but the conspicuous absence of a persistent property law unquestionably added to the frequent violence of social upheavals.

The Judicial System in the United States

The United States may be one of the youngest countries in the world, having a history of about 240 years, but its legal system may very well be one of the oldest, tracing its heritage to the beginning of the old Anglo-Saxon legal system. This is not difficult to understand: when the English pilgrims came to the New World, they were new beings; they brought with them their language, their culture, their religion, their customs, and their way of solving disputes among themselves – the English common law system.

The legal system of England began with the Norman Conquest in 1066, about 600 years old when it came to the New World, and about another 100 years during which it was used in the English colonies before the United States came into being. Most of the founding fathers, and the framers, of the new country and its Constitution, had been English lawyers under the British colonial governments. Their revolution was against Kind George, III, and his tyranny, not the English culture or its legal system. So, when the War of Independence was over, nothing was changed except that the King was replaced by a federal government founded on the basis of a Constitution.

Thus the United States is said to be a constitutional republic, having a federal government which derives its authority to rule from the consent of the people, and from the "several states" that had been independent, and remain very much so even today. For this reason, there are two parallel systems of government, and dual judicial systems in the United States. And for that reason, not surprisingly, every American

lives under the dual systems, having dual citizenship – the citizen of the United States, and the citizen of the state wherein he resides.

The federal government is one with limited (enumerated) powers – whatever powers granted under the Constitution, and the state government is said to be a government of general powers – whatever powers that have not been granted to the federal government.

Management of land as private properties is such a power that has not been granted to the federal government. For this reason, you will never see or hear such thing as "the property law of the United States", but only the "property law of New York", or "property law of California", although in most cases the difference is skin deep only.

Not much of a difference exists in the court structure either. Under both systems, the federal and state, there are trial courts where a legal dispute is filed, appellate courts where appeals are heard, and a supreme court in each state, and one for the United States, making a final decision on a particular case. There are of course other courts of special purposes, such as Court of Customs, and numerous administrative adjudicatory bodies that function in various administrative departments. But for our purposes here in the study of the property law, most of our course materials come from state courts, and sometimes from a federal court taking the position of a state court following state laws.

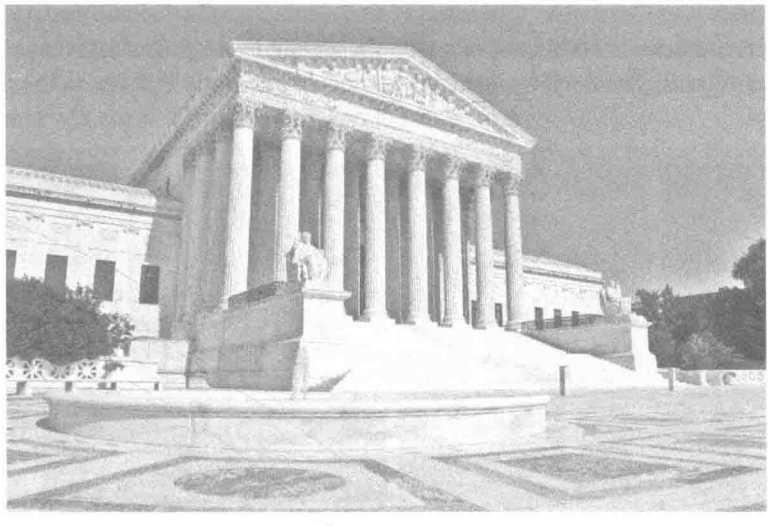
Take, for example, a typical land dispute. Abe purchases a piece of land (let's called it "Blackacre") from Bobby by paying him a sum of money on agreed terms. Abe goes to the county clerk's office to have his newly purchased property recorded, and receives a Title Paper. Deal is over, right? Maybe, and maybe not. Xavia comes one day and tells Abe that his purchase is invalid because Bobby cannot sell his land. Why? Xavia shows Abe a document drafted by O'Neil, the original owner, which granted Blackacre to Bobby and his heirs, if he remains married to his wife Carrol. Bobby divorced Carrol before selling Blackacre. Xavia thus says to Abe, "Your title must fail, because Bobby was no longer entitled to the property which must revert back to O'Neil. And since I'm the only descendent of O'Neil, only I can take title to Blackacre." Abe disputes that claim.

Where do they go to solve their legal dispute? They should go to the state trial court, the lowest court, to file a lawsuit. The names of the state trial courts vary greatly, from State District Court to Superior Court, to Supreme Court (e.g., in New York City). Then if they want to seek appeal, they go to court of appeals. Again, the names vary. In New York City, the appeals court is called the Supreme Court, Appellate Division. The last stop of their legal journey would be the state highest court for a final appeal. In most states, it is called the "Supreme Court of [state name]." In New York State, guess what? It cannot use that name because it's already taken by the lowest court. The highest court, the court of last resort, in New York State is called the "Court of Appeals."

Suppose they still don't agree with each other, can they go to the Supreme Court of the United States? No, if the effect of Xavia's document (*i.e.*, validity of O'Neil's

original grant) is the only issue, the state supreme court decision is the last word on it. The U.S. federal Supreme Court does not have authority to review a state court decision over state law issues.

The Supreme Court and the laws of the United States



Court House of the United States Supreme Court

Do this kind of cases of property issues never find their way into the U.S. Supreme Court? Yes, they do, as long as the parties can find some "federal issues" in their dispute. For example, X says to B, "You cannot sell your property to A, an Asian, because of a covenant in our community that prohibits sales of property to Asians." A private document containing racial discrimination is not against the law, but the U.S. Constitution does not allow federal or state governments to enforce such a document. Whether this covenant is enforceable is surely a federal constitutional issue, and therefore certainly reviewable by the U.S. Supreme Court.

The Supreme Court of the United States is specifically established by Article III of the Constitution, with very narrow jurisdiction of hearing appellate cases from lower federal courts (involving "federal issue"), and a few specified types of original claim, such as lawsuit between states, or between a state and a foreign country, etc.

The Court may not review a state court's decision, except to the extent of constitutionality in the application of the state laws. The Court, like any other courts (state courts or lower federal courts), will have to follow the statutes passed by Congress (that, of course, is reviewable for constitutionality), and its own case law, as well as common law traditions under the historically the most important principle of *stare decisis* (meaning, "Let the decision stand"). Each previously decided case carries with it the precedential value – the convincing reasoning – which will guide later courts in

deciding similar cases. This is so-called the "unwritten law". Why unwritten? Because the wording of the law is buried in the judicial opinions, and that's the reason we study the cases in order to understand what the law is, in sharp contrast to the continental European practice of promulgating the law in black and white in the form of a statute. A common law judge would habitually be suspicious of a statutory law. Because the words are taken out of their contexts, you would first need to interpret what the words mean, and that spells trouble. Of course, if there is statutory law directly on point over a dispute, and there is nothing wrong with the statute itself (proper legislative intent, proper applicability of the law), the judge would simple apply that law as the primary authority.

Current Supreme Court Justices

Frequently we encounter citations of "Restatement of the Law" (such as the Restatement of Property, or Restatement of Tort) and sometimes the statutory law of "land transactions", or "housing acts". The Restatement is a summary of rules made by courts in a form of a statement, which is organized and published by American Law Institute as legal treatises. A judge may follow it, or refuse to do so for some reason. A statutory law is binding and the judge must follow in deciding cases. Yet in the majority of cases, it is the "case law" that controls. The case law, or the precedential law, carries much more weight than any other forms of "law", as an American judge would be more familiar with the cases. He would not hesitate to refuse application of the statutory law if he feels uncomfortable with it, but he would be extremely cautious if he has to deviate from the established rules derived from previous cases.

Another fascinating and yet complex aspect of the common law system is its jury system that flourishes in the United States more than anywhere else in the common law world. The common law trial process is also known as the adversarial process in which the litigating parties present their arguments, along with evidence to establish the facts, to the court which consists of the judge and jury. The judge would not inter-